SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957. NO. 947.

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, RICHARDSON DILWORTH, Mayor of the City of Philadelphia, PHILADELPHIA COMMISSION ON HUMAN RELATIONS, WILLIAM ASHE FOUST and ROBERT FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA AND THIRTEEN SUBSTITUTED TRUSTEES OF THE ESTATE OF STEPHEN GIRARD, Deceased,

Appellees.

On Appeal From the Supreme Court of Pennsylvania.

MOTION AND PETITION OF WILLIAM ASHE FOUST AND ROBERT FELDER FOR REHEARING OF ORDER OF JUNE 30, 1958, REFUSING TO NOTE PROBABLE JURISDICTION AND DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

WILLIAM T. COLEMAN, JR.,
2635 Fidelity-Phila. Trust Bldg.,
Philadelphia 9, Pa.,
RAYMOND PACE ALEXANDER,
40 South 19th St.,
Philadelphia 3, Pa.,
LOUIS H. POLLAK,
127 Wall Street,
New Haven, Conn.,
Attorneys for Appellants, William Ashe Foust and Robert Felder.

International, 711 So. 50th St., Phila. 43, Pa.

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To the Honorable Earl Warren, The Chief Justice of the United States, and to The Associate Justices of the Supreme Court of the United States:

William Ashe Foust and Robert Felder respectfully move this Court pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, for a rehearing on the Order made herein on June 30, 1958 which refused to note Probable Jurisdiction and denied petitioners' request for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania to review its judgment in this case.

STATEMENT.

On April 23, 1958 a Jurisdictional Statement was filed in this Court, which in the alternative, pursuant to 28 U. S. C. § 2103 requested this Court to issue a Writ of Certiorari under 28 U. S. C. § 1257(3) to the Supreme Court of the Commonwealth of Pennsylvania to review its judgment in this case. The questions presented in that Jurisdictional Statement were as follows:

"On April 29, 1957, this Court held that the Board of Directors of City Trusts, the City agency created by the Pennsylvania Act of June 30, 1869, P. L. 1276, to administer Girard College, violated the rights of Negro appellants guaranteed them by the Fourteenth Amendment when it rejected their application for admission solely because of their race, even though Girard's will provided that the school was for "poor, male, white orphan children." *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230. This Court also held that the admission policies of the College were subject to this Court's ruling in *Brown v. Board of Education*, 347 U. S. 483. The Orphans' Court of Philadelphia County on remand, without hearing, notice or request of any party to the litigation, on its own motion, and in a proceeding whose only purpose was to obtain an order requiring the admission of certain Negroes to Girard College, removed the City of Philadelphia as trustee of the entire Girard Estate and appointed a "private" group of thirteen trustees, six of whom (the majority of the Board) were appointed upon the express condition and order that they resign from their governmental positions as members of the Board of Directors of City Trusts. The Orphans' Court then dismissed the petition of the Negro appellants for admission to Girard College solely on the grounds of their race. On appeal to the Supreme Court of Pennsylvania, counsel for the substituted trustees appeared although no petition to intervene had been filed. Counsel for the Board of City Trusts entered his appearance as ap-

pellee, but failed to appear at argument to protest the Board's removal. The Supreme Court of Pennsylvania held that while there exists the general common law power, the jurisdiction to remove the public trustees was conferred upon the Orphans' Court of Philadelphia County by Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 Purd. Stat. § 320.331, which provides that the court can remove a trustee "when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office." The court below affirmed the orders.

The questions presented are:

1. Whether Section 331(5) of the Fiduciaries Act of April 18, 1949, P. L. 512, 20 PURD. STAT. § 320.331, violates the Fourteenth Amendment to the Constitution of the United States in so far as it authorizes or requires the judicial ouster of public trustees named in Girard's Will and authorized by state statute, when such judicial ouster is for the express and sole purpose of continuing the exclusion of Negro appellants from Girard College solely because of their race.

2. Whether the exercise of state judicial power to remove a trustee violates the Fourteenth Amendment when the expressed and sole purpose and effect of its exercise is to deprive Negro appellants of their previously adjudicated constitutional right to attend Girard College.

3. Whether a state, consistently with the Fourteenth Amendment can convert a publicly operated school into a "private" school solely for the express purpose of denying Negroes their previously adjudicated constitutional right to attend the school prior to the conversion.

4. Whether, despite the removal of a municipal agency as trustee, Girard College is not still in constitutional contemplation a public institution whose admissions policies are subject to the limitations of the Fourteenth Amendment.

(a) Because there remains in force so many other substantial forms of governmental supervision, subsidy and control; particularly, the requirement that the City of Philadelphia remain as guardian for all students at Girard College;

(b) Because the "new" trustees include the majority of the appointed members of the Board;

(c) Because the "new" trustees have been ordered to administer not only Girard College, but all the other trusts established for the public welfare by Girard's Will;

(d) Because Girard College cannot in any event escape the century of history in which governmental nurture of every kind has translated Stephen Girard's testamentary desires into a great public institution and increased the estate from $2,000,000 to $100,000,000.

5. Whether the action of the Pennsylvania courts on remand from this Court was inconsistent with the mandate of this Court.

6. Whether the appointment of "private" trustees not contemplated by the will does not impair the rights of the Government of the United States which was named ultimate successor trustee by Stephen Girard."

On June 30, 1958, this Court entered an order which denied the Writ of Certiorari and dismissed the appeal.[1]

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1. Appellants submit that the appeal jurisdiction of this Court was appropriately invoked on the authority of *McCollum v. Board of Education*, 333 U. S. 203. They assume that the dismissal of the appeal was on the basis of appellees' representation that the constitutionality of the statute involved was not raised in the Orphans' Court. See Appellees' Motion, p. 15. Appellants never had an opportunity to raise it in the Orphans' Court, there being no notice or hearing. In the Supreme Court of Pennsylvania Appellees relied upon the statute as the basis for the Orphans' Court's action (Brief for Substituted Trustees, Appellees, Sup. Ct. of Pa. Jan. Term, 1958, Nos. 109-121, p. 18.), and, furthermore, urged that appellants could not complain of a denial of a hearing in the Orphans' Court because

JURISDICTION OF THIS COURT.

This motion for rehearing is made pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954.

The grounds on which this motion is made are intervening circumstances of substantial or controlling effect (*NAACP v. Alabama*, October Term, 1957, No. 91, decided June 30, 1958), other substantial grounds available to petitioners although not previously presented (*Capital Federal Saving & Loan Ass'n v. Smith*, 316 P. 2d 252 (Colo. 1957)) and certain policy considerations showing the general applicability of the questions presented not heretofore raised.

REASONS FOR GRANTING THE MOTION AND PETITION.

The press coverage, both national and local, given this Court's action on June 30, 1958, reaffirms that this case presents questions whose resolution have immediate importance far beyond the particular facts and parties involved. The Court's action was interpreted as if this Court had "ruled that the appointment of private trustees for Girard College was legal, and, in effect, sustained the refusal to

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"They are being given an adequate opportunity to present their arguments before this Court [Sup. Ct. of Pa.]". See Brief for Substituted Trustees, Appellees, Sup. Ct. of Pa. Jan. Term 1958, Nos. 109-121, pp. 26-27. Thus, Appellees avoided the argument of a lack of hearing in the Orphans' Court by asserting that due process was observed since Appellants had the right to present their arguments in the Supreme Court of Pennsylvania. Now, however, they say petitioners are precluded from raising the issues here because the issue was first raised in the Supreme Court of Pennsylvania. Appellants clearly raised the issue in the Supreme Court of Pennsylvania and that Court clearly passed upon it. See Jurisdictional Statement, pp. 6-7. Accordingly petitioners here did not argue lack of due process; but they strenuously urged the unconstitutionality of the Fiduciaries Act of April 18, 1949, section 331(5), as applied. Thus, it would seem that the Appeal is proper.

admit Negro students" see *Philadelphia Evening Bulletin,* July 1, 1958, page 1; *The Philadelphia Evening Bulletin,* July 9, 1958, page 34. Petitioners are convinced that the action of the Pennsylvania Courts violated rights guaranteed them by the Fourteenth Amendment and that the decision is not an isolated decision of a state court, which though in error does not present that recurring type of situation which this Court will review. There are countless numbers of trust funds administered by State and Municipal bodies. In Philadelphia alone there are over ninety and its position is not unique. See Petition for Rehearing, U. S. Sup. Ct. Oct. Term, 1956, No. 769, p. 28 in *Commonwealth v. Board of Directors of City Trust,* 353 U. S. 230. The fact that this Court reviewed an earlier stage of this very case necessarily negates any contention that Girard College presents an isolated situation. Petitioners are constrained, therefore, to file this Petition for Rehearing asserting the following grounds:

1. A basic issue in this case is whether common law or statutory state judicial power can be employed to change trustees when the change is for the sole purpose of putting in private trustees who it is hoped can refuse on the basis of race, without violating the Fourteenth Amendment, Negroes admission to an institution previously adjudicated as being subject to constitutional limitations imposed by the Fourteenth Amendment. In other words the issue is whether State judicial action violates the Fourteenth Amendment where the result of the State action is to permit private persons to take action which they can take only after the state courts by the use of judicial power have altered the status quo and which the state itself could not take. This Court, on June 30, 1958, for the first time, clearly and unequivocally held that State judicial action so described violated the Fourteenth Amendment. In *NAACP v. Alabama,* Oct. Term, 1957, No. 91, 26 United States Law Week 4489, (decided June 30, 1958) this Court held:

> "It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from State action but from private community pressures. The crucial factor is the interplay of Governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold." p. 4493

Since the Fourteenth Amendment denies Alabama the power to apply its common law discovery rule upon a showing that private persons will assert economic pressures on Negroes whose NAACP membership is disclosed, it would seem that Pennsylvania must necessarily be denied the power to apply its common law or statutory rule to substitute trustees where the admitted effect and sole reason for its exercise is to permit private persons to do what the named governmental trustee could not do, to wit, refuse Negroes admission. Cf. *Derrington v. Plummer,* 240 F. 2d 922 (5th Cir., 1956), *cert. denied,* 1 L. Ed. 2d 719.

Moreover in *NAACP v. Alabama, supra,* this Court held "It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." (p. 4493).

If the Pennsylvania Legislature had attempted to pass legislation ousting the governmental trustee solely because it would have to admit Negroes such statute would not square with the Fourteenth Amendment. See *e.g., Adkins v. School Board of the City of Newport News,* 148 F. Supp. 430, 444-445 (E. D. Va., 1957), *aff'd,* 246 F. 2d 325 (4th Cir., 1957); *Orleans Parish School Board v. Bush,* 242 F. 2d 156, 162 (5th Cir., 1957). The same constitutional restrictions are applicable to state courts. *NAACP v. Alabama, supra* at p. 4493.

2. The decision of the Supreme Court of Pennsylvania is in conflict with the recent decision of the Supreme Court of Colorado in *Capital Federal Saving and Loan Association v. Smith*, 316 P. 2d 232 (Colo. 1957), noted in 58 COLUM. L. REV. 571 (1958). In that case plaintiffs, Negroes, purchased property in an area which by agreement among plaintiffs' predecessors in title and adjoining land owners, was subject to an executory limitation which provided that any land conveyed to a colored person "shall be forfeited to . . . the then owners of . . . [other] lots . . . who may assert title thereto by filing for record notice of their claim with the recorder of . . . Denver". The court there held that an executory interest to take effect in possession upon conveyance of property to a Negro, tended to prevent the purchase of property by a Negro, and is unenforceable in state courts. The decision of the Pennsylvania Supreme Court instead accepts *Charlotte Park and Recreation Commission v. Barringer*, 242 N. C. 311, 88 S. E. 2d 114 (1955), *cert. denied*, 350 U. S. 983, where the North Carolina court refused to apply the rationale of *Shelley v. Kraemer*, 334 U. S. 1, to a limitation under which property was granted to a Park Commission so long as it was used as a recreational facility for whites only. The court reasoned that the limitation created a determinable fee in the Park Commission and a possibility of reverter in the grantor to take effect automatically if Negroes were permitted to use the property, and since title would automatically vest in the grantor without judicial intervention on the happening of the contingency (use by Negroes), *Shelley v. Kraemer*, was not applicable. In the instant case, the Supreme Court of Pennsylvania applied this latter reasoning even though here the divesting of the property from the City occurs by the use of the very judicial intervention, the absence of which the North Carolina courts thought determinative in *Charlotte Park and Recreation Commission v. Barringer*, *supra*. This Court should review the Pennsylvania case to make it clear that "outmoded common law terms" in no

way alters the rule that state judicial power can not be used to make effective, indeed possible, subsequent racial segregation by private persons.

To be sure, this Court does not normally grant certiorari where there is a conflict of decisions among state courts, cf. Rule 19(1)(b). Here, however, the conflict between Colorado on the one hand, and North Carolina and Pennsylvania, on the other hand, rises out of the interpretation of the Fourteenth Amendment and this Court's decision in *Shelley v. Kraemer*, 334 U. S. 1. This type of conflict clearly warrants the exercise of this Court's certiorari jurisdiction.

In any event, it is clear that the Pennsylvania Court has decided a federal question of substance in a way which is definitely not in accord with the applicable decisions of this Court. Cf Rule 19(1)(a).

3. Municipalities throughout the country own outright or in trust many types of property including schools, swimming pools and recreational facilities and in many instances the land was acquired by deed of trust or otherwise under an instrument which limits the use thereof to particular racial groups. See, *e.g.*, *Woods v. Bell*, 195 S. W. 902 (Texas, 1917); *Charlotte Park and Recreation Commission v. Barringer*, *supra*.

Recent decisions of this Court make it clear that these racial limitations can no longer be applied by the governmental body. *Pennsylvania v. Board of Directors of City Trusts*, 353 U. S. 230. As the Board of Directors of City Trusts of the City of Philadelphia pointed out in their Petition for Rehearing in 353 U. S. 230 this decision left open the equally widespread problem whether the racial restriction can be continued merely by transferring the property to a so-called private group. Lower federal courts have usually held that after such transfer the constitutional restriction remains. Cf: *Derrington v. Plummer*, 240 F. 2d 923 (5th Cir., 1956).

But more fundamental is, as this Court has pointed out, the duty which this Court has to enforce the Fourteenth Amendment, also "rests upon the member of the several state legislatures and all executive . . . officers of the several states." *Borders v. Rippy*, 247 F. 2d 268, 272 (5th Cir., 1957). In the instant litigation the Mayor of the City of Philadelphia, City Council and the Commonwealth through its Attorney General recognized their obligations to see to it that the Fourteenth Amendment was observed. Petitioners believe this is the first case where state officials have been alert to their responsibilities and commenced litigation to force an institution to comply with the Fourteenth Amendment. Yet the sole result of this salutary recognition is that public responsibilities for over a hundred million dollars of property is eliminated. It will necessarily have a debilitating effect upon State officials to accept their responsibility under the Fourteenth Amendment if the recognition thereof can permit state judicial action to oust them of responsibility as trustees which they have accepted for the general public good.

If the Pennsylvania decision is left standing it also presents the inference that this Court's decisions in the field of racial segregation can be undone simply by state judicial action which call school board members private individuals or trustees. It would seem greatly in the public interest to get this important question, which obviously will come up and be recurring, settled in a law suit originating in a state whose public executive, judicial and legislative officials will without a doubt follow this Court's decision.

4. The alertness of the state executive and legislative officials to their responsibilities to enforce the Fourteenth Amendment might have led this Court to assume that legislative action in the Commonwealth of Pennsylvania could be employed to eliminate the racial restriction, thus making unnecessary the exercise of more drastic federal

constitutional power. *Cf. Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U. S. 70, 73-75; *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512 (1949), *cert. denied*, 339 U. S. 981. But the "stark fact" is that those who have resisted petitioners' admission in this case have maintained that State or Federal, Legislative or Judicial or even Constitutional power can never open up Girard College to Negroes. Moreover, since this Court's action of June 30, 1958 has generally been interpreted as approval of the Pennsylvania Court's action, it will be difficult to get the "private" trustees to recognize their social duty to admit Negroes even if not required by the Federal Constitution, especially since their claimed defense was based upon the constitutional rights of white orphans.

CONCLUSION.

The rehearing of the Order denying the Petition for a Writ of Certiorari and refusing to note Probable Jurisdiction should be granted and on such rehearing the judgment below reversed.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.,
RAYMOND PACE ALEXANDER,
LOUIS H. POLLAK,
Attorneys for Appellants William Ashe Foust and Robert Felder.

Certificate of Counsel.

The undersigned, counsel for the petitioners, hereby certify the foregoing Petition is presented in good faith and not for delay, and said Petition is confined to intervening circumstances of substantial or controlling effect and to other substantial grounds available to Petitioners although not previously presented.

WILLIAM T. COLEMAN, JR.
RAYMOND PACE ALEXANDER
LOUIS H. POLLAK

Dated Philadelphia, Pennsylvania
July 21, 1958.